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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 27

AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL.,
Appellants,

vs.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL.

Appeal from the Supreme Court of the State of Arizona

No. 47

LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL.,
Appellants,

vs.

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION

Appeal from the Supreme Court of the State of Nebraska

No. 34

GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, ET AL.,
Appellants,

vs.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

I

Appellees in the Arizona case argue (Br. pp. 50-51), and we agree, that if the statutes in issue in this case are upheld on the theory that they validly protect an alleged right to work as a non-unionist, then it follows inevitably from *Shelley* v. *Kraemer*, 334 U. S. 1, that the laws of the thirty-five States which enforce union-security contracts are unconstitutional. For, in enforcing such agreements,

these States do deny to persons who refuse to join the contracting labor organization the very same alleged right which the Arizona appellees rely upon here. The issue then is not, as such appellees suggest (Br. pp. 6-25), merely whether the States which outlaw union-security contracts are acting "reasonably"—the issue is whether it is the minority of States which outlaw, or the majority of States which enforce union-security agreements, which are denying fundamental rights guaranteed by the Constitution. If, as a majority of the States believe, there is no right to work as a non-unionist which warrants denying to union members the right to use any lawful means, including union-security agreements, to induce non-members to join, the absence of such a right is attributable to recognition that the constitutional right to form and join labor organizations comprehends the right to use all lawful means to eliminate non-union competition. If the laws in these States, which have stood unchallenged for many years, are constitutional, the statutes in issue in these cases must fall.

II

Arizona appellees also appear to recognize that the result of their constitutional philosophy in this case is to deny to labor organizations, as such, any of the protections accorded by the First Amendment (Br. p. 39). The attempted denial to labor organizations of the right to engage in political activity with which this Court dealt in *United States* v. *C. I. O.*, 335 U. S. 106, was predicated precisely on the philosophy advanced here that protection of the "rights" of dissident members warranted prohibition of political activities of the organization which were authorized by a majority of its membership. In that case it was urged that the alleged right of a union member to refrain from participation in the union's political activities warranted destruction of the right of labor organizations to take effective political action. In this case it is urged that the alleged right to work as a non-unionist warrants

destruction of the right of labor organizations to function effectively in the economic sphere. In either case recognition of the claimed individual right would deny to labor organizations rights which this Court has recognized are conferred upon them by the Constitution.

III

Critical to the argument of appellees in all these cases is the assertion that union-security agreements are devices whereby labor organizations secure a monopoly of the labor supply, and that labor monopolies, equally with business monopolies, are subject to outlawry under the Constitution (Br. pp. 25, et seq.). If this argument were valid, it would mean that all labor organizations could constitutionally be outlawed. If employees who join together to eliminate competition among themselves over wages and working conditions are deemed constitutionally on a parity with businessmen who combine to eliminate price competition, then, no matter how voluntary their association, and even if their group is restricted to employees of a single employer, their organization may constitutionally be condemned. Such a result could be reached only by ignoring, as appellees do, the fact that opportunity for workers to improve their wages, hours and working conditions through the elimination of competition among themselves is guaranteed by the Constitution as the only meaningful alternative to virtual slavery, and that this goal is a corollary of, not antithetical to, an economic system based on competition among businessmen. Elimination of competition over wage rates and working conditions within an industry through successful unionization can and indeed does assist, rather than retard, proper operation of that system.

It is true that some labor unions may, on occasions, as appellees urge (Br. pp. 14-19), misuse their powers for the purpose of eliminating price or product competition, or may aid businessmen to achieve monopoly. But possibilities of abuse inhere in all of the great freedoms guaranteed

by the First Amendment; such possibilities have never been deemed an excuse for their abolition. The abuses themselves, indeed, may be checked, but the constitutional right of workers, through self-organization, to achieve equality of bargaining power with employers, and to eliminate competition over wages and working conditions, may not be subverted in the process.

IV

The excuse offered by Arizona appellees for exempting employees who refuse to join labor organizations from the operation of union-security agreements is that allegedly "large labor organizations are so organized and operated that the ruling officialdom exerts a coercive control over the membership, which even large groups of workers are helpless to resist." (Br. pp. 22-23.) While Arizona appellees disclaim that this argument leads to the conclusion that "labor organizations should be suppressed or crippled," it is clear that the approach here adopted by the States, which they defend, comes precisely to this. For, as we have demonstrated in our main brief (pp. 37-61), denial to labor organizations of the right to seek, by lawful means, to eliminate non-union competition does cripple such organizations. The constitutional road to the correction of undemocratic practices where they exist among labor organizations is to require that democratic principles be applied. To substitute anarchy for majority rule, as Arizona appellees would do, accords neither with reason nor with the Constitution.

V

The Arizona appellees make much of the reference made by appellants in their brief to various statutory protections as constituting some equivalent to protections traditionally afforded by union-security agreements, and appellees infer therefrom that labor organizations are now making "demands for statutory security."

No such demand was made or implied; the references to statutory protections were made simply as indicating that the existence of the Railway Labor Act afforded a partial answer to claims that unions in the railroad industry were able to maintain themselves without the union shop. That even these protections are not adequate is demonstrated in our economic brief, pp. 66-80. Nor did appellants intend to imply that the existence or passage of such laws as the Railway Labor Act or the National Labor Relations Act would afford justification for outlawing all types of union-security arrangements. The importance of labor organizations in our society as a practical exercise by workingmen of the right of assembly and as a practical means by which they achieve adequate wages and working conditions dictates that their existence should not be made to depend upon the winds of statutory chance, but that they must be left free to use the traditional and peaceful devices for their maintenance. What the State can give by way of statutory protection today, it can withdraw, or emasculate, or feebly enforce tomorrow.

In any event, a prohibition of "yellow dog" contracts, such as exists in Arizona, or even the prohibition against interference with the right to work as a union member, such as exists in the Nebraska and North Carolina laws, does not afford an equivalent of the protections achieved under union-security agreements. The "yellow dog" prohibitions prevent only the obtaining of commitments from individual workers that they will not join unions; they do not prevent discriminations against union members in obtaining and retaining employment. Even this latter protection is no equivalent for a statutory scheme for compulsory collective bargaining which includes rights of exclusive representation and protections against all forms of employer interference with the right of self-organization, including the outlawing of company-dominated unions. And even such a statutory scheme does not afford protection against a gradual elimination of majority status and dimi-

nution of bargaining strength by replacement of union workers by non-union workers in the course of ordinary turnover.

Respectfully submitted,

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